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February 12, 2019

By ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation of American Cable Association, GN Docket No. 18-122

Dear Ms. Dortch:

On February 9, 2019, Ross J. Lieberman, Senior Vice President, Government Affairs, American Cable Association (“ACA”) and the undersigned met separately with Umair Javed, wireless and international advisor to Commissioner Jessica Rosenworcel; and representatives from the Wireless Telecommunications Bureau, International Bureau, and Office of Engineering and Technology copied below. On February 11, 2019, Ross J. Lieberman, Mary Lovejoy, Vice President of Regulatory Affairs, ACA, and the undersigned met separately with Rachael Bender, wireless and international advisor to Chairman Ajit Pai; and Erin McGrath, wireless, international and public safety advisor to Commissioner Michael O’Rielly.

In the meetings, ACA discussed the importance of the C-band spectrum for ACA’s members, which has been well-documented in ACA’s prior filings,¹ the harms to ACA members and others that refarming of the band would produce, and the deficiencies of the C-Band Alliance (“CBA”)’s refarming proposal. ACA also summarized the mechanisms that would mitigate the harms and keep incumbents whole, consistent with its comments and reply comments in the captioned proceeding.

¹ See Comments of the American Cable Association, GN Docket No. 17-183, at 1-19 (Oct. 2, 2017) (“ACA NOI Comments”); Comments of the American Cable Association, GN Docket No. 18-122, at 2-8 (Oct. 29, 2018) (“ACA Comments”); Reply Comments of the American Cable Association, GN Docket No. 18-122, at 4-6, 17-21 (Dec. 11, 2018) (“ACA Reply Comments”).

ACA members are important stakeholders in the C-band ecosystem. Earth station users have rights to use the spectrum that are equal to those of satellite operators.² They have made an investment in earth station infrastructure that, according to the satellite industry itself, exceeds that made by the satellite industry.³ It was in recognition of their important role that the *NPRM* asks whether, “[i]nstead of paying FSS operators for relinquishing spectrum usage rights nationwide or in specific geographic regions a mechanism instead might pay earth stations for relinquishing access to C-band spectrum in specific geographic areas.”⁴

Harms to ACA members. The reallocation of 200 MHz of C-band spectrum would lead C-band backhaul prices to increase sharply, leading output, choice, and quality to decrease. ACA has shown that, to preserve current capacity and choice, the loss of 200 MHz of C-band spectrum requires the construction of as many as 15 in-orbit operational satellites.⁵ CBA has proposed to build and launch a much lower number of satellites to replace four in orbit that it claims it would not otherwise replace.⁶

² While the Commission streamlined rules applicable to C-band earth station operators in 1991 to replace licenses with registrations, it did so simply because receive-only earth stations present no potential for interfering with the rights of others, not because the rights of earth station users have somehow lesser dignity than those of satellite operators. See Amendment of Part 25 of the Commission’s Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services, *Notice of Proposed Rulemaking*, 2 FCC Rcd. 762 ¶ 48 (1987); Amendment of Part 25 of the Commission’s Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services, *First Report and Order*, 6 FCC Rcd. 2806, 2806 ¶ 4 (1991).

³ See Coleman Bazelon, Maximizing the Value of the C-Band, The Brattle Group, at 22 (Oct. 29, 2018) (attached as Appendix A to Joint Comments of Intel Corp., Intelsat License LLC, and SES Americom, Inc., GN Docket No. 18-122 (Oct. 29, 2018)) (“Brattle Report”) (“The lost satellite assets are conservatively estimated to have a present value of about \$7.3 billion, with additional transition costs potentially doubling that number. The estimated lost economic value of all C-Band earth station assets is as much as \$12.4 billion.”).

⁴ Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz, *Order and Notice of Proposed Rulemaking*, 33 FCC Rcd. 6915, 6937 ¶ 65 (2018).

⁵ William P. Rogerson, *Calculation of the Additional Number of Satellites Required to Maintain Existing C-Band Downlink Transmission Capacity If Some C-Band Spectrum is Repurposed to Other Uses*, at 5 (Dec. 11, 2018) (attached to ACA Reply Comments).

⁶ Letter from Jennifer D. Hindin, Counsel for the C-Band Alliance, Wiley Rein LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 18-122, Attachment at 1 (Dec. 19, 2018).

This dramatic reduction in the capacity of the satellite industry will necessarily result in significant price increases for C-band backhaul because CBA is essentially proposing a merger-to-monopoly: CBA will know the price that 5G operators are willing to pay per C-band MHz, and it is not plausible that its members would not price their satellite services all the way up to the price 5G operators are willing to pay. In addition, earth station operators would no longer have competitive choices and would be unable to obtain spectrum from another C-band satellite operator because CBA members would be near full capacity. In these circumstances, CBA could price the spectrum just below the cost of replacing C-band backhaul with fiber backhaul.⁷

Second, ACA members will need to supplement their backhaul needs with fiber, which is not a viable alternative today but may become necessary as the cost of C-band backhaul goes up, its quality goes down, and it becomes unattractive to programmers. In many cases, this may require the construction of new fiber facilities to remote headends. When the cost of constructing such facilities is prohibitive, ACA members will simply have to do without programming that is no longer distributed over the C-band.

Third, a portion of the benefits that ACA members would have received from their investment in C-band facilities will be foregone. That investment was made in reliance on the continued availability of the 500 MHz of C-band spectrum. As mentioned, SES and Intelsat's own expert quantifies the earth station investment that is at risk at \$12.4 billion.⁸

Fourth, the risk of interference from 5G services is over and above the other harms from loss of spectrum listed above. Not only will satellite users lose almost half of the C-band spectrum to 5G; in addition, they will suffer out-of-band emissions from their new neighbors. ACA has strong concerns about CBA's plans to install filters at more than 15,000 earth stations.

Deficiencies in CBA proposal. CBA argues that an auction presents a holdout problem, as satellite operators would be dis-incentivized to participate in any auction.⁹ But that is easily resolvable: an incentive auction could be based on transponder units that correspond to satellite operators' current capacity.¹⁰

⁷ ACA maintains that fiber is inaccessible to many rural operators due to the cost involved. See ACA NOI Comments at 16-18; ACA Comments at 3-4. But that prohibitive cost may become an expensive reality for many operators that are unable to obtain C-band backhaul due to the high prices charged by satellite operators whose use of spectrum has been cut in almost half.

⁸ Brattle Report at 22.

⁹ Comments of the C-Band Alliance, GN Docket No. 18-122, at 27-28 (Oct. 29, 2018) ("CBA Comments").

¹⁰ In this manner, for example, satellite operators can be invited to tender their transponder units at progressively decreasing levels down to the level where at least one operator tenders its units for refarming and at least one does not. The satellite operator that does not tender its units and prefers to continue in the satellite business simply leases transponder capacity from the operator

CBA's claim that its approach complies with Section 309(j) of the Communications Act¹¹ is also misleading.¹² The prior instances of the Commission's award of licenses without auction that CBA cites are inapplicable here. In none of these cases did the FCC dispense with an auction in order to allow the licensee to sell its spectrum. In all of them, the FCC dispensed with an auction to permit the licensee to make use of the spectrum. And a grant of CBA's proposal would be unlikely to survive court scrutiny. It would not comply with Section 309(j), it would run afoul of the duty to promote competition, and it would not be reasoned decision-making on the present record.

CBA's proposal also only takes CBA members' opportunity cost into account, and discounts that of all other stakeholders (except for the vague promise that earth station operators would receive filters, over which ACA has serious concerns).

ACA proposal. ACA believes that the rulemaking record is currently insufficient for substantive analysis and reasoned decision-making. The satellite industry should submit information for the record of this proceeding on its current and projected use of the C-band and the current and projected demand for its services, including information about its plans submitted exclusively to Commission staff on November 19, 2018.¹³ A Protective Order would allow such a submission.

ACA also believes that a reverse auction would serve the interests of all stakeholders. The FCC could conduct an incentive auction (based on the transponder units to avoid the holdout problem), to be followed by a 5G auction. Users and operators would be compensated only to the extent necessary to recoup their costs and foregone investment. The statutory incentive auction specifically allows sharing a portion of auction proceeds with licensees "based on the value of the relinquished rights."¹⁴ As discussed above, earth station operators qualify as "licensees" under that provision. The user's costs and foregone investment are a conservative measure of the "value of the relinquished rights." The public receives the net proceeds.

In the alternative, if the CBA proposal were to be adopted, the Commission should mandate that CBA includes C-band users in the negotiations. That process can be efficient: C-band users have 30 days to coalesce into three groups (rural users; urban users; programmers) that represent all stakeholders; CBA and the groups have 30 days to reach agreement with those groups; if no agreement is reached, the parties would come to agreement using baseball-rules arbitration.

that did tender its shares (a standard frequently used arrangement between satellite operators) at predetermined rates. Several variants of that concept are possible.

¹¹ 47 U.S.C. § 309(j).

¹² CBA Comments at 29-32.

¹³ See Letter from Michele C. Farquhar, Counsel to the C-Band Alliance, Hogan Lovells, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 17-183, 18-122, at 2 (Nov. 19, 2018).

¹⁴ See 47 U.S.C. § 309(j)(8)(G).

In sum, the ACA members' rights to the spectrum are no lesser than those of the satellite operators, and the same categories and extent of harm should be recognized for both of those stakeholder constituencies.

Respectfully submitted,

/s/_____
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